INDEX

	Page
Opinion below	1
Jurisdictional Statement	2
Statutes Involved	2
Questions Presented	2
Counterstatement of the Case	3
A. Proceedings Before the Agency	3
B. Proceedings In the Court of Appeals	4
Argument	5
Introduction	5
I. The Issues Involved Are of Limited Importance	6
II. No Inconsistency Exists with Decisions of This Court	6
III. The Decision Is Not Unprecedented and Illogical	7
IV. The Decision Below on the Issue of Interest Does Not Conflict with Any Prior Decision of the Appeals Court	8
V. States Marine Lines Mala Fides	11
Conclusion	11

TABLE OF CASES

American Tobacco v. *Com. Gen. Transatlantique*, 1 U.S.S.B. 97 (1925), aff'd 31 F.2d 663 (2d Cir. 1929), cert. denied, 280 U.S. 555 (1929)	10
Arkadelphia Milling Co. v. *St. Louis S.W.R. Co.*, 249 U.S. 134 (1919)	10
Becker v. *New York*, 77 App. Div. 635, 78 N. Y. S. 1064 (1902)	8
Chicago & S.E.R. Co. v. *McEwen*, 35 Ind. App. 251, 71 N.E. 926 (1904)	9

Page

Cook v. *Chicago R.I. & P.R. Co.*, 81 Iowa 551, 46 N.W. 1080 (1890) 8

Flota Mercante Grancolombiana v. *Federal Maritime Com'n.*, 112 U.S. App. D.C. 302, 302 F. 2d 887 (D.C. Cir. 1962) 8

I.C.C. v. *United States*, 289 U.S. 385 (1933) 7

Gimbel Bros., Inc. v. *Barrett*, 218 F. 880 (D.C.F.D. Pa., 1914) rev'd. on other grounds, 226 F. 623 9

Hernandez v. *Bernstein*, 2 U.S.M.C. 62 (1939) 10

L. & N.R.R. v. *Sloss-Sheffield Co.*, 269 U.S. 217 (1925) 10

Miller v. *Robertson*, 266 U.S. 243 (1924) 9

Pacific Gamble Robinson Co. v. *Minneapolis & St. L. R. Co.*, 134 F.Supp. 849 (D.C. Minn. 1955) 9, 10

Penn. R. Co. v. *International Coal Co.*, 230 U.S. 184 (1913) 7

Smith Brothers & Cooper v. *Hanson*, 106 Kan. 32, 187 P. 262 (1920) 9

State v. *Lott*, 67 Ala. 147 (1881) 9

Swift & Co. and Swift & Co. Packers v. *Gulf & South Atlantic Havana SS Conf., et al.*, 6 F.M.B. —— (1961) 8

Wabash Ry. Co. v. *Koenig*, 271 F. 909 (C.C.A. Mo. 1921), cert. denied 257 U.S. 660 (1921) 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1082

STATES MARINE LINES, INC.,
Petitioner,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA AND ISBRANDTSEN COMPANY, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT ISBRANDTSEN COMPANY, INC. IN OPPOSITION

OPINION BELOW

Petitioner, States Marine Lines, Inc. (hereafter SML), has applied for a Writ of Certiorari to review a decision and order of the United States Court of Appeals for the District of Columbia Circuit, dated January 3, 1963. The unanimous opinion of the Court of Appeals, per Wright, Circuit Judge, is reported at —— U.S. App. D.C. ——, 313 F.2d 906.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on January 3, 1963. A denial of SML's Petition for Rehearing *En Banc* was entered on February 7, 1963. Petition for Writ of Certiorari was filed on May 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and 5 U.S.C. § 1040.

STATUTES INVOLVED

The statutes involved are the Shipping Act, 1916, as amended, 39 Stat. 728, 46 U.S.C. § 801, et seq., specifically Sections 17 and 22 of that Act (46 U.S.C. §§ 816 and 821); the Administrative Orders Review Act of 1950, 64 Stat. 1129, as amended, 5 U.S.C. § 1031, et seq., popularly known as the Hobbs Act, specifically Section 10 of that Act (5 U.S.C. § 1040) and 62 Stat. 928 (28 U.S.C. § 1254 (1)), the pertinent texts of which are set forth in Appendix B to the Petition.

QUESTIONS PRESENTED

1. Whether there is substantial evidence in the record to support the agency's finding that SML unjustly discriminated against Isbrandtsen.

2. Whether the differential between the contract and non-contract rates, which differential was unjustly exacted from a shipper, may, in the circumstances of this particular case, constitute the measure of damages.

3. Whether, in a proceeding before the Federal Maritime Board (now Commission), the administrative agency is justified in awarding interest only on any amounts of the reparation award unpaid after 60 days from the date of the award, rather than from the date some nine (9) years previously when the freight overcharges were wrongfully collected, and the complaint was filed, when

their only exculpation is that the shipper failed to prove the exact dates on which the damages occurred.

COUNTERSTATEMENT OF THE CASE

A. Proceedings Before the Agency[1]

When the complaint in this case was filed with the former Federal Maritime Board on November 3, 1952, Isbrandtsen Company, Inc. was an independent American-flag common carrier by water in foreign commerce as well as a merchant in international trade. The Far East Conference is an association of common carriers by water in the foreign commerce of the United States which has operated, under successive agreements, the first of which was approved by the United States Shipping Board in 1922. Although the basic conference agreement had been approved by the predecessor agency of the now Federal Maritime Commission, there was never a formal approval given the Conference to employ the exclusive-patronage system or to utilize differentials in freight rates between contracting and non-contracting shippers. Since 1950, the Conference has employed a dual rate system with a spread of a flat $4.00 a ton between the contract rate and the non-contract rate. Shippers who sign the exclusive-patronage contracts receive a discount of $1.00 per short ton from the established rates of the Conference for cotton shipments.

The complaint filed under section 22 of the Shipping Act, 1916, 46 U.S.C. 821, alleged that the Far East Conference and its member and associate lines, including SML and Waterman Steamship Corporation, had violated section 17 of the Shipping Act of 1916, as amended, which forbids any common carrier by water in foreign commerce from charging any rate which is unjustly dis-

[1] The facts as stated are those found by the Federal Maritime Board in its Report in Docket No. 726, 6 F.M.B. ____, which is printed at pages 119 to 152 of the Joint Appendix.

criminatory, by refusing to carry cotton from the Gulf to Japan either pursuant to the terms of their own exclusive-patronage contract or subject to the lower freight charges applicable to shippers having such a contract.

Early in 1952, Isbrandtsen, which had planned to operate a chartered vessel from Gulf ports to the Far East, accepted a booking from H. Kempner & Co., a cotton shipper, to carry cotton owned by Kempner from the Gulf to Japan at a rate of $1.80 per 100 pounds. No vessels were available for charter by Isbrandtsen. Being contractually liable to deliver the cotton to Japan, Isbrandtsen contacted SML and Waterman Steamship Corporation in order to arrange shipment and requested a conference contract and the applicable rate of $2.00. The request was refused after numerous delaying tactics were employed by the Conference. Under protest, Isbrandtsen shipped the cotton to Japan on the two Conference lines at the higher non-contract rate of $2.20 pursuant to 51 bills of lading dated from August 3, 1952 to September 18, 1952, all of which showed it as the shipper. The bills of lading were signed by the masters of the SML and Waterman ships, and Isbrandtsen's freight payments as shipper were accepted. On all the shipping documents Isbrandtsen is designated as the shipper.

On August 4, 1961, the Federal Maritime Board found that SML demanded, charged and collected an unjustly discriminatory rate and awarded reparations to the extent of the damage suffered which is the amount of the differential between the contract and non-contract rates, but allowed interest only from sixty (60) days after the date of the award.

B. Proceedings In the Court of Appeals

The case came before the United States Court of Appeals for the District of Columbia Circuit on cross-ap-

peals. SML filed its Petition to Review (No. 16,667) on September 29, 1961 contesting the finding of unjust discrimination and the award of reparations against it. Neither the Far East Conference nor Waterman Steamship Corporation joined in the SML appeal. Isbrandtsen filed its Petition to Review (No. 16,671) on October 3, 1961 questioning the Federal Maritime Commission's action in limiting interest from a time subsequent to the award rather than allowing it from the time of wrongdoing by SML and Waterman in conformance with the relevant authorities.

The Court of Appeals' opinion and order of January 3, 1963 disposed of both Petitions for Review in favor of Isbrandtsen. A Petition for Rehearing *En Banc* filed by SML was denied Per Curiam on February 7, 1963.

ARGUMENT

Introduction

Although petitioner has enumerated various alleged grounds intended to justify review on Writ of Certiorari, we respectfully submit that there is no special and important reason, within the meaning of this Court's Rule 19, to justify an exercise of sound judicial discretion in granting the Petition in the instant proceeding. Contrary to SML's contentions, no conflict or inconsistency exists with the decisions of this Court or with decisions in other circuits, no novel law is made, and the importance of the issues has been overstated. It is significant that SML alone is carrying its improvident contentions forward, unescorted by either Waterman Steamship Corporation or the Far East Conference. The unanimous opinion of the court below is clear, concise and correct. Certainly the Court of Appeals is not guilty of departing from the accepted and usual course of judicial proceedings, as petitioner suggests. The decision, accordingly, does not warrant further review.

I. *The Issues Involved Are of Limited Importance.*

The Petition implies that the decision of the Federal Maritime Commission, as approved by the Circuit Court of Appeals, will destroy the contract rate system. This is not a case attacking the dual rate system. Rather it is purely and simply a reparations case, no matter what nuances petitioner attempts to introduce to give it wider appeal. Furthermore, SML previously asserted, and we concur, that this case is *sui generis*. At page 29 of the Brief for the Petitioner in No. 16,667 below they stated:

> "Isbrandtsen's position was unique. There is no evidence that any other person, before or since, has occupied a similar position with respect to cargo carried by any Conference line."

In reality, petitioner is seeking to avoid the bitter fruits of its own misconduct by parading before this Court imaginery results of the decision below. What petitioner's extravagant claim reduces to is that this Court should rewrite the Shipping Act so it may with impunity continue to discriminate against shippers.

If the contentions that SML raises did, in fact, have industry-wide implications, which they do not, other parties in interest would have appeared in the proceedings before the Court of Appeals and would have supported the present Petition.

II. *No Inconsistency Exists With Decisions of This Court.*

Petitioner argues that the Shipping Act should be so construed as to permit a carrier to injure a shipper without fear of redress. The damage claimed and proved by Isbrandtsen is that SML charged it, as a shipper, a rate higher than the rate it had a right to charge. Isbrantsen sued for the exact damage it suffered, the difference between the amount it was forced to pay and the amount SML lawfully should have assessed. Respondent

was injured, in the circumstances of this case, by the amount over and above the sum petitioner had a right to collect from it. The Court below carefully analyzed SML's theory on this point and found it untenable.

Inasmuch as there has been no judicial determination of the proper measure of damages under the Shipping Act, it follows that there is no standard from which this case can be considered to deviate. As to the alleged inconsistency with *I.C.C.* v. *United States*, 289 U.S. 385 (1933), and *Penn. R. Co.* v. *International Coal Co.*, 230 U.S. 184 (1913), we submit that legally the cases are neither consistent nor inconsistent, since they bear no factual relationship one to the other. In the *I.C.C.* and *Pennsylvania Railroad* cases, the prejudiced shippers also owned the goods transported and sued under the provisions of the Interstate Commerce Act. Here, the shipper did not own the commodity shipped and complained pursuant to the provisions of the Shipping Act.

Viewed in general terms, the holding of this Court in the *I.C.C.* and *Pennsylvania Railroad* cases and the decision of the Court of Appeals in this case is that damages are not presumed to flow from the mere fact of discrimination. We agree. Both the agency and the Circuit Court, however, found that Isbrandtsen had proved not only the discrimination but that it had been damaged and the exact amount of that damage.

III. *The Decision Is Not Unprecedented and Illogical*

Petitioner maintains that the holding on the question of unjust discrimination is "unprecedented and illogical." It is neither. SML's concept of what the law should be, to wit, a carrier should be allowed to discriminate unjustly against a shipper without the shipper having a remedy, is fallacious by its mere statement. The Agency found that (J.A. 131, 147 and 148), the Conference had allowed Isbrandtsen to ship at contract rates

just prior to its unwarranted refusal to carry the cotton on a like basis which precipitated this litigation and that the same type of cotton was carried for other shippers at contract rates, under identical conditions, on the same ships which lifted the cotton shipped by Isbrandtsen. In deciding this case the Agency followed the holding of its decision in *Swift & Co. and Swift & Co. Packers* v. *Gulf & South Atlantic Havana SS Conf., et al.*, 6 F.M.B. —— (1961) and the common law, *Cook* v. *Chicago R.I. & P.R. Co.*, 81 Iowa 551, 46 N.W. 1080 (1890).

IV. *The Decision Below on the Issue of Interest Does Not Conflict With Any Prior Decision of the Appeals Court*

SML argues that there is a conflict between the ruling below and the decision of that court in *Flota Mercante Grancolombiana* v. *Federal Maritime Com'n.*, 112 U.S. App. D.C. 302, 302 F. 2d 887 (D.C. Cir. 1962). *Ex facto jus oritur*, the law arises out of the fact, is a time-honored maxim of the common-law which petitioner apparently chooses to ignore.

Reliance upon the *Flota* case is wholly unwarranted in the matter at bar. In *Flota, a shipper who owned the cargo was suing for the loss of anticipatory profits. Any damage there suffered was speculative, conjectural and unliquidated.* Here, the Federal Maritime Board found as a fact on the question of damages that Isbrandtsen "incurred expenses, lost profits and suffered damage to the extent of its out-of-pocket expenses at (sic.) the result of the denial of a contract and payment of the higher rates" (J.A. 148). This, then, is a case where the damages were clearly liquidated, a sum certain being wrongfully withheld from your respondent at the time of the shipments in 1952. Damages are liquidated where, as here, the amount awarded may be ascertained by a process of measurement, calculation or computation from the data given by the proof, without reliance upon opinion or discretion after the concrete facts have been determined. *Becker* v. *New*

York, 77 App. Div. 635, 78 N.Y.S. 1064 (1902); *Smith Brothers & Cooper* v. *Hanson*, 106 Kan. 32, 187 P. 262 (1920).

Interest upon liquidated claims is allowed as a matter of right, and is not dependent upon the discretion of the judge or jury, *State* v. *Lott*, 67 Ala. 147 (1881). "Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of a duty, or for the failure to keep a contract, interest attaches as an incident." Id. at 155. Interest upon liquidated damages will be allowed from the time of the accrual of the claim for liquidated damages. *Chicago & S.E.R. Co.* v. *McEwen*, 35 Ind. App. 251, 71 N.E. 926 (1904). One who has had the use of another's money (in this case now for over a decade) should in justice make compensation for its wrongful detention which includes interest from the time the payment should have been made. *Miller* v. *Robertson* 266 U.S. 243, 257 (1924). *Wabash Ry. Co.* v. *Koenig*, 274 F.909 (C.C.A. Mo. 1921), cert. denied 257 U.S. 660 (1921). "In all damage cases the damages are to be assessed with reference to the time when the damage was suffered, and when the adjustment takes place at a later date the assessment is to be made as of the earlier date, with the lapse of time between that and the later date in mind. Strictly and technically, interest is not allowed from the date of damage suffered to damage assessed, but a sum is allowed for damage on the day the damage is assessed, which is the equivalent of a less sum allowed on the day the damage was suffered. Practically, however, it is the equivalent of interest." *Gimbel Bros., Inc.* v. *Barrett*, 218 F. 880, 886 (D.C.E.D. Pa., 1914) *rev'd on other grounds*, 226 F. 623. More specifically, when a carrier deliberately flouts its duty, "the risk of interest should be upon the one who wrongfully fails to perform its duty, not upon the shipper who has the right to demand the performance of the duty imposed by law." *Pacific Gamble*

Robinson Co. v. *Minneapolis & St. L. R. Co.*, 134 F. Supp. 849, 853 (D.C. Minn. 1955). Interest is traditionally granted in transportation cases of this type. For example, see *L. & N. R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 238-39 (1925); *Wabash Ry. Co.* v. *Koenig*, 274 F. 909 (8th Cir. 1921), cert. denied 257 U.S. 660 (1921); and *Arkadelphia Milling Co.* v. *St. Louis S.W. R. Co.*, 249 U.S. 134, 147 (1919).

Controlling precedents of the regulatory agency require that interest be awarded from the time the violation of the Shipping Act occurred. For example, in the case of *Hernandez* v. *Bernstein*, 2 U.S.M.C. 62 (1939), the violation took place in 1934. In its 1939 decision the Commission awarded reparation "with interest thereon at the rate of six per cent per annum from December 31, 1934." Interest was also granted at six per cent from the date of the payments by complainant to the date of the award in *American Tobacco Co.* v. *Com. Gen. Transatlantique*, 1 U.S.S.B. 97 (1925), *aff'd* 31 F.2d 663 (2d Cir. 1929), cert. denied, 280 U.S. 555 (1929).

Furthermore, the courts have sanctioned the Board's usual practice of awarding interest from the time of the statutory violation. In *Pacific Gamble Robinson Co.* v. *Minneapolis & St. L. R. Co.*, 134 F. Supp. 849 (D.C. Minn. 1955), the Court stated, in awarding interest to the shipper from the date of his damages (at 853),

> "In that the Court has now determined that plaintiff was damaged by defendant's wrong in the sum of $20,050.85, it must necessarily follow that that compensation will require the allowance of interest . . . That is, the loss which the Court now has ultimately determined that plaintiff sustained in no less measure dates from June 19, 1949."

Section 22 of the Shipping Act (46 U.S.C. 821) requires "full reparation to the complainants for the injury caused by such violation;" one element of which is interest on the damages suffered running from the time of the

wrongful acts. The Commission was remiss in its duty to make the compensation complete by failing to allow interest from the time of the wrong (1952) which would place the shipper in substantially the same position he would have been in had the carriers not violated the Act by unjustly discriminating against him. Its justification for failing to follow its own precedents, other relevant cases and simple logic was that Isbrandtsen did not prove the exact date on which its claim arose. Since Isbrandtsen has waived interest prior to the filing of its complaint, November 3, 1952, a date not in dispute, the Court of Appeals simply granted interest from that date.

The result below is in no way anomolous. Different factual situations may be expected to bring forth different legal conclusions.

Apparently, petitioner's point is that the Court below specifically had to use the words of art "abused its discretion" in regard to the Federal Maritime Commission in order to sustain its award of interest. If so, their quarrel is with semantics not substance, for that is clearly the import of the Court of Appeals' opinion when in its final paragraph it talks of the Board's "justifying" its failure to award interest from the date of the wrong and in the next sentence reduces the attempted justification to nothingness.

V. *States Marine Lines Mala Fides*

SML complains that the appellate court found without warrant in the record or the FMC report that they conducted their business *vis-a-vis* Isbrandtsen in bad faith.

The Report of the Board, 6 FMB —— (J.A. 130) states:

> "Isbrandtsen asked Far East Conf. for a contract for its August 1952 shipments but the Conference representative advised it would not permit Isbrantsen to sign a contract to cover these shipments and States

> Marine advised that even if Isbrandtsen obtained a freight contract, States Marine would not carry the cotton Isbrandtsen tendered."

which is hardly a testimonial to SML's honest intentions. (Quote is substantiated by J.A. 38, 39, 40, 44, 52, 53, 54, 58, 68, 74, 77, 80, 81, 83, 84, 86, 87, 89 and 90.)

Strangely, SML then complains about a footnote reference to Isbrandtsen's exercising its right to challenge the legality of dual rate systems. Strange, because it was SML, at p. 18 of their brief in No. 16,667 below, which introduced the fact of Isbrandtsen's litigating the exclusive patronage pacts.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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June 7, 1963